2000

The State of Utah v. Juan Quitero Perez : Brief of Appellant

Utah Court of Appeals

Stephen R. McCaughey; Attorney for Appellant.
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	**Case No. 20000517-CA**
JUAN QUITERIO PEREZ,	:	**Priority No. 2 (incarcerated)**
Defendant/Appellant.	:	

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

This is a supplemental opening brief of appellant, in an appeal from convictions for aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (1999), and attempted murder, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1999) and Utah Code Ann. § 76-4-102 (1999), in the Third Judicial District Court, the Honorable J. Dennis Frederick, presiding.

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(2)

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INTRODUCTION

Current appellate counsel was appointed after the Legal Defenders Association conflicted out of the case.

With the stipulation of counsel for the State, counsel has obtained the Court's permission to file a supplemental opening brief of appellant.

Because the original opening brief of appellant appears to adequately state the case history, facts of the case, and argument, this brief will address the sole issue omitted from the opening brief by stating the issue, standard of review and preservation, by summarizing the argument, by presenting the argument, and by stating a conclusion.

In all other respects, counsel relies on the original opening brief, and hereby reiterates all positions asserted therein.

Once the State has had an opportunity to respond to the issue raised in this brief, counsel intends to file a reply brief replying to those of the State's arguments which require a reply.

STATEMENT OF ISSUE, STANDARD OF REVIEW AND PRESERVATION

1. Did the trial court err in instructing the jury?

This Court reviews the adequacy of jury instructions for correctness. See, e.g., State v. Carruth, 947 P.2d 690, 692 (Utah App. 1997), aff'd, 1999 UT 107, 993 P.2d 869.

This issue was not raised below, so Perez relies on the plain error and ineffective assistance of counsel doctrines.

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Constitutional errors are particularly appropriate for correction under the plain error doctrine. See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

To demonstrate ineffective assistance of counsel, counsel must demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See

e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994). The prejudice prong of the ineffective assistance of counsel doctrine requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See e.g. State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

SUMMARY OF ARGUMENT

The attempted murder conviction must be reversed because the trial court failed to instruct the jurors on the elements of attempt.

Utah case law recognizes that this error impacts on the defendant's constitutional right to a jury's unanimous decision on each element of the offense, and constitutes plain error.

Because trial counsel, like the trial court, should have recognized and raised this error, the error also constitutes ineffective assistance of counsel.

ARGUMENT

I.
THE ABSENCE OF AN ATTEMPT ELEMENTS INSTRUCTION REQUIRES REVERSAL OF THE ATTEMPTED MURDER CONVICTION.

The jury convicted Mr. Perez of attempted murder, and the consecutive one to fifteen year prison sentence imposed by Judge Frederick was for the attempted murder conviction (R. 321, 332-333).

There was no attempt elements instruction given to the jury (R. 282-317). The information instruction and the instruction stating the definition of attempted murder and the elements instruction for attempted murder all inserted the word attempt or

attempted (R. 282, 304, 305, in Addendum 1 to this brief), but none of them stated the elements of attempt set forth in Utah Code Ann. § 76-4-101 (1999). That statute provides,

> 76-4-101. Attempt -- Elements of offense
>
> (1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
> (2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.
>
> (3) No defense to the offense of attempt shall arise:
> (a) because the offense attempted was actually committed; or
> (b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

This absence of an accurate elements instruction requires reversal of the attempted murder conviction under basic Utah law. See, e.g., State v. Jones, 823 P.2d 1059, 1061, (Utah 1980)("In State v. Roberts, 711 P.2d 235 (Utah 1985), we stated, "The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." Id. at 239 (Utah 1985) (citing [State v.] Laine, 618 P.2d [33] at 35 [(Utah 1980)]). See also State v. Harmon, 712 P.2d 291, 292 (Utah 1986) (per curiam); State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984).").

In reversing Perez's conviction on this point, this Court may rely on State v. Harmon, *supra*, which is very similar to this case. In Harmon, a *per curiam* opinion,

the court reversed a conviction for attempted robbery because the trial court there failed to instruct the jury on the elements of attempt, but instead merely inserted the word attempted into the robbery elements instruction. 712 P.2d at 291. The Harmon court found that the trial court's error was reversible, and did not even require Harmon to order a transcript of the proceedings for the appeal, because Utah law clearly requires a correct elements instruction to sustain a criminal conviction. Id. The court found that because the jury was not instructed on the elements of the crime, the court could not say that the jury properly convicted Harmon of each element of the offense. Id. at 292. See also Constitution of Utah, Article I § 10 ("... In criminal cases the verdict shall be unanimous."); State v. Saunders, 1999 UT 59 ¶ 61, 992 P.2d 951, 967 (reversing conviction under Article I § 10 for absence of unanimity instruction in a case wherein the jurors may have convicted defendant on different factual theories, indicating that unanimity is necessary as to each element of an offense); Apprendi v. New Jersey, 530 U.S. 466 (2000)(requiring jury assessment of any issue which increases punishment).

Likewise in the instant matter, the trial court did not instruct the jurors that Perez could not be convicted of attempted murder unless the prosecution proved he committed a substantial step which strongly corroborated his intent to murder, but simply inserted the word attempted into the general murder elements instruction.

Because trial counsel did not object to the absence of an attempt elements instruction,[1] Perez relies on the plain error and ineffective assistance of counsel doctrines in addressing this issue for the first time on appeal.

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Constitutional errors are particularly appropriate for correction under the plain error doctrine. See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

To demonstrate ineffective assistance of counsel, counsel must demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994). The prejudice prong of the ineffective assistance of counsel doctrine requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See e.g. State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

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[1] Trial counsel's failure to object on the record might be attributable to Judge Frederick's having counsel discuss the jury instructions in an off the record meeting in chambers and then intemperately rushing counsel through his exceptions on the record. See R. 360 at 280-283, in Addendum 2 to this brief.

Utah courts recognize that the absence of an accurate elements instruction constitutes plain error impacting the defendant's constitutional rights to a unanimous jury verdict. See Jones; Laine, *supra*. Given that the error violates the defendant's constitutional right to a unanimous jury verdict, correction of the error under the plain error doctrine continues to be particularly appropriate. See Lindsay, *supra*.

On the basis of this law, trial counsel should have objected to the failure of the instructions to accurately state the elements of the offense charged, and the failure to do so was prejudicial because it deprived Perez of his right to a unanimous jury verdict. See Saunders, *supra*.

The error was especially prejudicial in this case, wherein the jurors knew so little of the assailant's state of mind at the time of the offense in this case, given that the only evidence bearing on that was the injuries inflicted and the problematic testimony of the victim. On these facts, the jurors may well not have been able to reach a unanimous verdict on the issue of whether the defendant acted with the requisite specific intent to murder had they been properly instructed. See, generally, e.g., State v. Bell, 785 P.2d 390, 393 (Utah 1989)(*plurality*)(in the course of holding that there is no attempted felony murder under Utah law, the court discussed with approval various cases recognizing that attempted murder is a specific intent crime requiring proof of intent to kill).

Because the jurors were not given an adequate elements instruction, the Court cannot say that they reached a unanimous verdict as to each element of the

offense, and a new trial is warranted on that count. See, e.g., Harmon; Saunders, *supra*.

CONCLUSION

This Court should reverse the attempted murder conviction and grant all relief sought in the original opening brief.

DATED this 2 day of July, 2001.

STEPHEN R. MCCAUGHEY
Counsel for Mr. Perez

CERTIFICATE OF DELIVERY/MAILING

I hereby certify that I have caused to be hand-delivered/mailed, first class postage pre-paid, two true and correct copies of the foregoing to Assistant Attorney General Marian Decker, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854 this 2 day of July, 2001.

STEPHEN R. MCCAUGHEY
Counsel for Mr. Perez

Addendum 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	**INSTRUCTIONS TO THE JURY**
vs.	:	**CRIMINAL NO. 991919507**
JUAN QUITERIO PEREZ,	:	
Defendant .	:	

INSTRUCTION NO. 1

You are instructed that the defendant JUAN QUITERIO PEREZ is charged by the Information which has been duly filed with the commission of AGGRAVATED BURGLARY and ATTEMPTED CRIMINAL HOMICIDE, MURDER . The Information alleges:

COUNT I

AGGRAVATED BURGLARY, a First Degree Felony, at 533 West Tiffany Town Drive, in Salt Lake County, State of Utah, on or about August 9, 1999, in violation of Title 76, Chapter 6, Section 203, Utah Code Annotated 1953, as amended, in that the defendant, JUAN QUITERIO PEREZ, a party to the offense, entered or remained unlawfully in the dwelling of Ellen Kuhel with the intent to commit an assault, and caused bodily injury to Ellen Kuhel.

COUNT II

ATTEMPTED CRIMINAL HOMICIDE, MURDER, a Second Degree Felony, at 533 West Tiffany Town Drive, in Salt Lake County, State of Utah, on or about August 9, 1999, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendant, JUAN QUITERIO PEREZ, a party to the offense, attempted to intentionally or knowingly cause the death of Ellen Kuhel.

INSTRUCTION NO. 25

Under the law of the State of Utah, Attempted Criminal Homicide constitutes Attempted Murder if the actor:

(a) attempted to intentionally or knowingly cause the death of another;

or,

(b) intending to cause serious bodily injury to another commits an act clearly dangerous to human life that attemptes to cause the death of another;

or,

(c) acting under circumstances evidencing a depraved indifference to human life engages in conduct which creates a grave risk of death to another and thereby attempts to cause the death of another.

INSTRUCTION NO. 26

Before you can convict the defendant, JUAN Q. PEREZ, of the offense of Attempted Criminal Homocide, Murder, as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 9th day of August, 1999, in Salt Lake County, State of Utah, the defendant, JUAN Q.PEREZ, attempted to cause the death of ELLEN KUHEL; and

2. That said defendant then and there did so: (a) intentionally or knowingly; or (b) intending to cause serious bodily injury to another, he committed an act clearly dangerous to human life, which act attempted to cause the death of ELLEN KUHEL; or (c) acting under circumstances evidencing a depraved indifference to human life, he knowingly engaged in conduct which created a grave risk of death to another and which conduct attempted to cause the death of ELLEN KUHEL; and

3. That said defendant then and there did so unlawfully.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Attempted Criminal Homocide,Murder as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

Addendum 2

duplicative of the elements instruction. It just is going to draw attention to the particular charge twice without giving any further information or we are going to need to do so. And we'll object on that basis.

THE COURT: Okay. As I indicated in our discussion in chambers, both of the elements instructions on the principal charges as set forth in the Information, Ag Burglary and Attempted Criminal Homicide, had definitional instructions supplementing them, which in my estimation are stock instructions and I opted to give those because I think they are more explicit in definition than the simple elements instructions themselves. So your exception is noted.

MR. WILLIAMS: Your Honor -- thank you, Your Honor.

With regard to the elements instruction of Attempted --

THE COURT: Let's have the Jury brought in.

MR. WILLIAMS: There are a few more.

THE COURT: Well, let's move it on, then. We are kind of fumbling around here. You are -- you need to make your exceptions so we can get on with it.

MR. WILLIAMS: That's what I am trying to do, Your Honor. I just received the packet --

THE COURT: You had the one that you excepted to in chambers, so...

MR. WILLIAMS: So far I am going through I have

found two mistakes, and I am just trying to find the ones to take exceptions to. I take exception to the elements instruction on Attempted Murder in this case in that it includes variations of Criminal Homicide that I don't think have a factual basis in this trial and weren't charged in the original charging document. I think that the only variation of intent -- Attempted Homicide that can go to the Jury in the elements instruction is attempted to commit homicide in that he intended to kill knowingly or intentionally and not on depraved indifference and not with regard to an act that created great danger to another.

THE COURT: Okay. Is that it?

MR. WILLIAMS: If I can have one moment?

Related to that, Judge, is the definitions instructions that are in the packet that will go to the Jury, obviously, that define terms that are in those portions of the Attempted Homicide element instruction that I objected to.

THE COURT: Okay. Now, let's bring in the Jury.

MR. JOHNSON: Judge, I'm sorry. I seen -- we seem to be missing one particularly dealing with the burglary. Number 20 deals with -- and if I may approach, maybe we can have Scott come up as well,

THE COURT: 20 is the lesser included; 20A; 20 is the elements of Aggravated Burglary.

MR. JOHNSON: I understand.

MR. WILLIAMS: We also have had -- it was a previous instruction. We never --

MR. JOHNSON: That was the State's because there is nothing that proceeds it as well.

If you look at Number 20, this should theoretically precede that.

THE COURT: Well, the actual location -- you substituted "dwelling" for "building."

MR. JOHNSON: Right.

THE COURT: And that was the one that was actually --

MR. JOHNSON: Okay.

THE COURT: -- substituted; isn't it?

THE COURT: Here's the dwelling instruction, and that's right here.

MR. JOHNSON: Okay. But that's not what this is, Judge.

THE COURT: Okay. That will be number -- that was originally then your Number 22. Look at your 22. Okay. We are going to proceed.

MR. WILLIAMS: That is the one that you've just added, Your Honor?

THE COURT: Was the Number 22 in your packet.

MR. WILLIAMS: That is one of the ones that I took

exception to on the basis of cumulative and duplicative.

THE COURT: Yes, you did, and that's fine.

MR. JOHNSON: Both the Aggravated Burglary...

THE COURT: Okay. Now, let's bring the Jury in, Counsel.

(Jury present.)

THE COURT: Please be seated.

The Jury has returned to the courtroom.

(Judge reads instructions to the Jury.)

THE COURT: Counsel, how much time do you need for your closing argument, Mr. Johnson?

MR. JOHNSON: Approximately an hour, Judge,

THE COURT: I will notify you two minutes of expiration of your time. You wish to split that 30 and 30?

MR. JOHNSON: Yes.

THE COURT: And, Mr. Williams?

MR. WILLIAMS: An hour maximum, Your Honor.

THE COURT: I will notify you likewise in two minutes.

You may proceed, Mr. Johnson.

THE INTERPRETER: Your Honor, could the Interpreter have a couple of minutes? I am still on Instruction 36.

THE COURT: No. You can continue with that as we get to the point where --

THE INTERPRETER: Then the Defendant will miss the